MICHAEL RODAK, JR., CL

In the Supreme Court of the United States

October Term, 1974
No. 74-529

ISAAC JOHNSON,
Petitioner,

VS.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

JOHN T. CORRIGAN, *Prosecuting Attorney of Cuyahoga County, Ohio*

GEORGE J. SADD
Assistant Prosecuting Attorney
Criminal Courts Building
1560 East 21st Street
Cleveland, Ohio 44114
1-216-771-0660
Attorneys for Respondent

JAMES R. WILLIS
1212 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
1-216-523-1100
Attorney for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed

the convictions. The Supreme Court of Ohio refused leave to appeal and dismissed an appeal as of right for the reason that no substantial constitutional question exists in this case.

The Ohio Courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is therefore presented by the petition for certiorari.

QUESTIONS PRESENTED

Respondent submits that the questions presented by the record in this case are more properly stated as follows:

1. Adequate instructions on credibility of witnesses were given to the jury by the trial court, and it was not reversible error to fail to give an instruction giving special emphasis to a defense theory already argued to the jury.

2. The trial court properly refused to charge the jury in a narcotics case with a cautionary instruction to the effect that the testimony of an undercover police informant is inherently unreliable.

3. Due process of law was not violated by use of an informant's testimony, especially in view of the fact, that such testimony was given voluntarily, without promises.

4. Where the evidence in a criminal case sustains the essential elements charged in the indictment, it is error for the trial court to withdraw the case from the jury and discharge the defendant.

STATEMENT OF THE CASE

Petitioner, Isaac Johnson, was indicted by the Cuyahoga County Grand Jury on November 10, 1972 for eight violations of the State of Ohio's narcotic drug laws. In Case No. CR 6441 petitioner was charged with:

(1) Unlawful possession of heroin for sale, Ohio Revised Code, Section 3719.20 (A)

(2) Unlawful sale of heroin, Ohio Revised Code, Section 3719.20 (B)

(3) Conspiracy to violate drug laws, Ohio Revised Code, Section 3719.20 (H).

In Case No. CR 6442 the petitioner was indicted for:

(1) Possession of heroin for sale

(2) Possession of heroin for sale

(3) Sale of heroin

(4) Sale of heroin

(5) Unlawfully permitting a building to be used to keep and dispense heroin, Ohio Revised Code, Section 3719.101.

Petitioner's two cases were consolidated for trial upon the State's motion. Also, on the State's motion count 3 of Case No. CR 6441, and counts 4 and 5 of Case No. CR 6442 were nolled. Petitioner was tried before a jury on the five remaining counts. On November 14, 1973, the jury returned guilty verdicts with respect to all counts involved. Petitioner was sentenced to the Ohio State Penitentiary for the term provided by law. Following his conviction, petitioner appealed to the Court of Appeals for the Eighth Judicial District. Unanimously the Court of Appeals affirmed the conviction of the petitioner.

Petitioner then sought review in the Ohio Supreme Court. That Court dismissed petitioner's appeal for the reason that no substantial constitutional question existed.

Petitioner now seeks review of his judgment of conviction. This court should deny the petition for a writ of certiorari.

STATEMENT OF THE FACTS

George W. Randle, twenty-five years old, and by his own admission a former heroin addict, acted for the Cleveland Police Department in purchasing heroin from the petitioner on three occasions and was the chief prosecution witness at the trial of the petitioner. Randle testified that he had worked with the police as an "undercover agent" for the past two years. Randle admitted his history of drug abuse on direct and cross-examination, and stated that he has since joined a methadone program and was at that time no longer using drugs (R. 37, 51-55).

Randle's arrest, indictment, conviction, probation record and police involvement were all brought out before the jury, through his own and police testimony.

Randle testified that on three separate occasions he made controlled heroin purchases from the petitioner under strict police supervision. Randle testified that on August 16th, August 18th, and September 5, 1972, he met with Cleveland Police Detectives, was searched by them and wired with a sound monitoring device and each time went to the Pine Tree Lounge near East 137th Street and St. Clair Avenue in the City of Cleveland to purchase heroin from the petitioner with money supplied him by the police. Randle testified at trial that inside the Pine Tree Lounge on August 16th he asked petitioner for "half a tea," i.e.,

one half teaspoon of heroin (R. 11-13). Randle identified the petitioner, Isaac Johnson, as the man who sold him the heroin contained in an envelope bearing Randle's initials and identified at trial as State's Exhibit 1 (R. 13-16). On August 18th Randle went through the same preliminary procedure and again asked for "Ike" at the Pine Tree Lounge and purchased "half a tea" of heroin from the petitioner; this substance was contained in an initialed envelope identified at trial as State's Exhibit 3 (R. 27). On September 5th, Randle again repeating the same procedures with the police department went to the Pine Tree Lounge and once more asked for "Ike" for "half a tea" of heroin which he purchased from the petitioner. Randle identified the substance from this purchase as State's Exhibit 4 and also identified the tape recordings that the police made of the conversations which he initialed on the cassette cover, as State's Exhibit 5.

Randle testified that he wasn't paid for his services nor were any promises made to him when the police requested that he help them in an undercover capacity.

Cleveland Police Detectives corroborated Randle's testimony that before and after each of the three controlled purchases of heroin Randle was stripped, thoroughly searched, and provided with money to make the purchases. On each occasion a Member of the Cleveland Police Department accompanied Randle to the immediate vicinity of the Pine Tree Lounge. For example, Detective Shaffer testified that he observed Randle enter and leave the Pine Tree Lounge during the purchase on August 16th. Detective Zimlich testified that on August 18th, he observed Randle go inside the Pine Tree Lounge and then from his vantage on the street saw Randle and the petitioner inside talking with each other. Over the monitoring device Detective Zimlich heard Randle ask the peti-

tioner for the "half a tea" of heroin. Detective Zimlich also testified that during the purchase on September 5th he was able to hear Randle's voice over the monitoring device and observe the petitioner in the Lounge just after Randle had walked back out onto St. Clair Avenue. The entire procedure as set out above was also corroborated by Detective Frank Gaughan who was present at all of the controlled purchases and who also saw the petitioner in the Pine Tree Lounge.

The record overwhelmingly reveals that the petitioner was guilty of the charges which were placed against him.

REASONS FOR DENYING THE WRIT

1. Adequate instructions on credibility of witnesses were given to the jury by the trial court, and it was not reversible error to fail to give an instruction giving special emphasis to a defense theory already argued to the jury.

2. The trial court properly refused to charge the jury in a narcotics case with a cautionary instruction to the effect that the testimony of an undercover police informant is inherently unreliable.

Petitioner contends that the trial court should have charged the jury with a cautionary instruction to the effect that the testimony of the State's witnesses was inherently unreliable. That contention cannot stand for several compelling reasons.

The trial court gave adequate instructions on the credibility of witnesses. The trial court instructed the jury that they could believe all of the informant's testimony, that they could reject and disbelieve all of the informant's

testimony, or that they could accept some parts of the informant's testimony and reject other parts of this testimony.

Moreover, petitioner's counsel argued quite vigorously to the jury the informant's past history of criminal involvement, drug abuse and general truthfulness as bearing on his credibility as a witness. Furthermore, it is a well-established principle of law in the State of Ohio as well as in other state courts that the weight of the evidence, including the question of credibility of witnesses, are questions for the jury. See, *State v. DeHass*, 10 Ohio St. 2d 230 (1967).

Petitioner's counsel had an unrestricted opportunity and, in fact, thoroughly attacked the informant's credibility. The jury weighed this and all other evidence before it on that basis, with the aid of the court's general charge on credibility of witnesses.

Clearly no error was committed by the trial court's refusal to give a special cautionary instruction giving special emphasis to a defense theory already argued to the jury. In a recent Sixth Circuit decision, *U. S. v. Thomas*, 484 F.2d 909 (6th Cir. 1973), the defense had requested a special charge. In affirming the conviction the court held:

> "Adequate instructions on credibility were given to the jury, and we do not consider that it was reversible error to fail to give an instruction giving special emphasis to a defense theory already argued to the jury. *Blauner v. United States*, 293 F.2d 723, 738 (8th Cir.), *cert. denied*, 368 U.S. 931, 82 S. Ct. 368, 7 L. Ed. 2d 193 (1961)."

Finally, in order to bolster petitioner's contention, his counsel has cited several Federal decisions. Some of those

cases deal with matters far different than those presented here and are easily distinguishable. These Federal decisions are not controlling on State courts. First, Federal District Court Judges have considerable latitude and discretion to comment on the evidence, including the testimony, whereas state judges in Ohio do not. Petitioner's special request for an instruction would constitute a comment on the informant's testimony. It has been held, under Ohio Law, that comment from the bench tending to bolster an informer's admittedly suspect credibility is prejudicial and reversible error. See, *State v. Thomas*, 36 Ohio St. 2d 68 (1973). Any comment from the bench tending to bolster the informant's credibility any further than had already been done on cross-examination would be unwarranted. See, *State v. Tabasko*, 22 Ohio St. 2d 36, 43, 44 (1970).

Under Ohio Law a court is only required to include in its instructions to the jury those written requests that embody correct statements of the law of this State. There is no established law in Ohio on a court's duty to specially instruct as to an addict-informer's testimony, as exists among the federal circuits. Therefore, the court did not err in refusing to give defense's special request to instruct the jury as such instructions did not represent a correct statement of Ohio Law. The State submits that the trial court committed no error in not giving the requested special instructions especially in view of the fact that the trial court adequately instructed the jury in its general charge with respect to the law on the credibility of witnesses.

3. Due process of law was not violated by use of an informant's testimony, especially in view of the fact that such testimony was given voluntarily, without promises.

Petitioner's counsel contends that due process of law was violated when the informant testified. Petitioner's counsel contends that the police promised the informant something in exchange for his testimony.

That contention cannot stand since it is not supported by the record. In fact, the contrary is true. The informant, Randle, testified that he wasn't paid for his services nor were any promises made to him when he was originally picked up by the police who suggested this kind of work to him (R. 37-38).

4. Where the evidence in a criminal case sustains the essential elements charged in the indictment, it is error for the trial court to withdraw the case from the jury and discharge the defendant.

Petitioner's counsel argues that the motions for directed verdicts should have been granted. Suffice it to say, that in the instant case there was direct evidence to sustain each count. For example, Randle's testimony, that heroin exhibits, as well as the detective's testimony, it would have been error for the trial court to direct a verdict for the petitioner. The jury had all the evidence properly before it and decided to accept Randle's testimony and the State's witnesses over the petitioner's denials on the stand. The credibility of any witnesses is a matter for the jury. It was the judge of the credibility of the witnesses. See *State v. DeHass*, 10 Ohio St. 2d 230 (1967).

CONCLUSION

In conclusion, the respondent submits that the petition herein fails to present any question of constitutional dimension justifying review by the Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN T. CORRIGAN, *Prosecuting Attorney of Cuyahoga County, Ohio*

GEORGE J. SADD
Assistant Prosecuting Attorney
Criminal Courts Building
1560 East 21st Street
Cleveland, Ohio 44114
1-216-771-0660
Attorneys for Respondent